No. 75-809

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

AFRO-AMERICAN PATROLMEN'S LEAGUE, INC.,

Petitioner,

vs.

JAMES B. CONLISK, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 26, 1975

SORG/CHICAGO U.S.A.

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Petitioner Afro-American Patrolmen's League respectfully prays that a Writ of Certiorari issue to review the decision of the court below holding that petitioner may not maintain the action in this case, the Writ to issue only in the event this Court should grant the petition for a writ of certiorari in No. 75-606, at this Term, filed by respondents.

OPINION BELOW

The Opinion of the Seventh Circuit in the present case, reported at 520 F.2d 1, is reproduced in the appendix to respondents' petition in No. 75-606. References in parentheses are to that appendix. The Opinion of the United States District Court for the Northern District of Illinois (The Honorable Joseph Sam Perry, Judge) is reported at 367 F. Supp. 476.

JURISDICTION

The Opinion of the Seventh Circuit was handed down June 30, 1975. A timely petition for rehearing was denied on September 3, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is an organization of policemen, whose purpose and activities include insuring that police officers conform to lawful standards of conduct and which has suffered sufficient injury in fact to have standing as a plaintiff in a suit to remedy widespread unconstitutional police conduct, deprived of standing merely because its members themselves are policemen?

STATEMENT OF THE CASE

The basic facts concerning this litigation are stated in respondents' petition for certiorari in No. 75-606 and in petitioners' brief in opposition to that petition. The specific facts relating to the question presented on this conditional cross-petition are as follows.

This lawsuit was brought by three organizations, each alleging active involvement in efforts to remedy a wide-

spread pattern of unconstitutional police misconduct, including the operation of complaint services which assisted hundreds of citizens aggrieved by such police misconduct. The court below upheld the standing of the other two organizations and recognized that the petitioner was in a virtually identical position with respect to the allegations showing an "injury in fact" that would support standing. However, the court below denied standing to the League because its members are policemen, on the ground that the remedy sought could result in some unidentified League members who now escape disciplinary sanctions becoming subject thereto, thus creating a "potential conflict of interest." (16a)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IN DISMISSING THE AFRO-AMERICAN PATROLMEN'S LEAGUE CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH OTHER COURTS OF APPEALS AND RAISES AN IMPORTANT FEDERAL QUESTION.

In dismissing petitioner from this case, the court below cited no supporting authority. (16a) It appears that the court recognized that the League had suffered the requisite "injury in fact" to have standing to challenge the legality of respondents' actions. *Cf., Sierra Club* v. *Morton,* 405 U.S. 727 (1972). However, it held that there existed a conflict between the League's prosecution of this suit and the potential interests of some of its members. The court reasoned that since the purpose of the suit was to remedy inadequate police disciplinary procedures, some unidentified members of the League might be harmed as a result of successful prosecution in this action, because an improved disciplinary system might conceivably "result in AAPL members who now escape disciplinary sanctions becoming subject thereto." (16a)

Though the court below did not explicitly so state, it seemed to be drawing on an analogy to the law of class actions, where it has long been held that a pervasive conflict of interest may create inadequate representation of the class by the named representatives which violates due process. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). However, in *Hansberry* there existed a total, irreconcilable conflict established on the record. Indeed, the inadequacy of representation bordered on the fraudulent.

Since the decision in *Hansberry,* several lower courts have made clear that the mere existence of a possible conflict of interest between the named representatives and certain portions of the class will not be sufficient to characterize the representation as "inadequate." In *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920, 937 (2d Cir. 1968), the court held that "the fact that some members of the class were personally satisfied with Defendants' [challenged policies] is irrelevant." In *Rosado* v. *Wyman,* 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970), *aff'd,* 437 F. 2d 619 (2nd Cir. 1970), 402 U.S. 991 (1971), the court held the representative parties adequate even though some portions of the class benefited to the exclusion, and potentially the detriment, of another portion. See also *Giordano* v. *Radio Corporation of America,* 183 F.2d 558, 560 (3rd Cir. 1950), involving a union membership which, on the evidentiary record, was sharply divided on the central issue of the case.

Here, success in this litigation would be to the benefit of the League, the hundreds of aggrieved citizen clients whom it has assisted, and virtually all of its members, who have committed themselves to assuring that police officers conform to lawful standards of conduct. Even by the inference of the court below, success here would be to the detriment only of an unidentified few who would wish to "escape disciplinary sanctions" for their unlawful conduct.

As a matter of law, even these unidentified few have no legally cognizable interest that is contravened by the League's prosecution of this action, for no policeman could have a valid interest in shielding his unconstitutional conduct from proper disciplinary action.

The ruling of the court below is not only without precedent in the law of standing and incorrect in terms of the law of class actions but also raises a vitally important question concerning the standing of persons who seek to challenge in the courts the unconstitutional practices of the institutions in which they work. On the record (i.e., the allegations of the complaint), the League has dedicated itself to the enforcement of constitutional standards of conduct in police work and has engaged in many activities on behalf of the public and on behalf of hundreds of aggrieved citizen clients in furtherance of that purpose.

If allowed to stand, the decision below might exclude from the courts those within institutions who seek to ensure that their institutions function in a constitutional manner—the very persons who are most knowledgeable about the improper practices of the agencies in which they work. To conclude as a matter of law that a police organization is always precluded from challenging patterns of unconstitutional police conduct is to deprive the courts, in cases challenging those patterns, of advocates who can best provide the facts and perspectives that their supervisors would undoubtedly rather keep undisclosed.

This Court should review a ruling that has such an undesirable consequence for our legal system.

II.

IN DISMISSING THE AFRO-AMERICAN PATROLMEN'S LEAGUE AS A PLAINTIFF, THE COURT BELOW VIOLATED THE DICTATES OF RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The case before the court below grew out of a motion to dismiss the action filed by respondents because of the al-

leged failure of petitioner and the other plaintiffs to state a claim upon which relief could be granted. Fed R. Civ. P. 12(b)(6). On such a motion, the allegations of the complaint are assumed to be true. *Cooper* v. *Pate,* 378 U.S. 546 (1964).

In their complaint, petitioner and the other plaintiffs have alleged nothing that would suggest the existence of the conflict which the court below inferred. Accepting the allegations of the complaint as true, it is clear that there is no conflict.

One of the purposes of the League is "to preserve and protect the rights of residents of Chicago against abusive and arbitrary police conduct [and] to assure that police officers conform to lawful standards of conduct." The League has undertaken a variety of activities in carrying out this purpose, including: establishment and operation of a program that has received complaints of police misconduct from hundreds of persons, including some of the individual plaintiffs below and has sought redress for these clients; programs and activities for education of the public with respect to police administration and conduct; formulation of proposals for specific reforms in police administration and conduct; meetings and negotiations with the responsible public officials to seek implementation of those proposals; and public advocacy of its purposes and proposals. Complaint, Paragraph 5.

It is firmly established in the law of class actions that adequacy of representation is a question of fact, to be raised and resolved in a trial court hearing. *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F.2d 909 (9th Cir. 1964); *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84, 93-94 (7th Cir. 1941). No such hearing has been held in this case. Rather, the court below improperly transgressed its role by making a

factual finding contrary to the complaint on an issue that had never been raised in the trial court.

If a hearing had been held in the trial court, petitioner could have shown that the very essence of the League, as a police organization and as a group of black police officers, is that it has defined and unwaveringly pursued a definition of the police role that places its members in concert, not in conflict, with the community's interest in lawful and professional police behavior.

Petitioner could also have shown that the resolve of the League *and its members* to reject and oppose conflict of interest which the court infers was stated at the very outset, in the announcement of the League's formation in July, 1968:

> We are going to elevate the black policeman in the black community to the . . . image-status . . . of a protector of the citizenry and not a brutal oppressor.
>
> . . .
>
> We are husbands, fathers, brothers, neighbors and members of the black community. Donning the blue uniform has not changed this. On the contrary, it has sharpened our perception of our responsibilities as black males in a society seemingly unresponsive to the needs of black people. We see our role as the role of a protector of this community and that is the role we intend to fulfill.

Lastly, petitioner could have shown that membership in the League has never been open to any person merely because of his status as a policeman, even as a black policeman. It has always been a condition of membership that one subscribe to, and consistently conform to, the principle of strictly lawful conduct toward civilians.

Thus the failure of the court below to comply with the requirements of Rule 12, which dictate that there be no dismissal without a factual inquiry in the trial court as to the accuracy of the inference that a conflict of interest exists, substantially prejudiced the rights of both the Afro-American Patrolmen's League and its members.

CONCLUSION

For the foregoing reasons, in the event the Court should grant the petition for a writ of certiorari in No. 75-606, this petition for a Writ of Certiorari should likewise be granted.

Respectfully submitted,

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

The Respondents, James B. Conlisk, Jr., et al., pray that the petition for writ of certiorari filed by petitioner be denied.

QUESTIONS PRESENTED

1. Whether a policeman's organization has standing as a plaintiff if it alleges harm only to reputation to its members in a lawsuit which seeks court control of a police department disciplinary system to reduce the alleged excessive use of force by policemen.

2. Whether the court below was correct in holding that a more effective police disciplinary system sought by the plaintiffs had a potential harmful effect upon members of

the plaintiff police organization and therefore the organization could not present the issues in an adversary context.

3. Whether the decision of the court below was consistent with decisions of this court and decisions of courts of other circuits.

STATEMENT OF THE CASE

This litigation is ancillary to the lawsuit in which certiorari is also pending before this court, *Conlisk* v. *Calvin*, No. 75-606. The facts are described in more detail in the petition and brief in opposition there. For the purpose of this case, it should be noted that seven individuals filed the present complaint, each alleging he had been subject to excessive force or other police misconduct. The individual plaintiffs were joined by three organizations, including the petitioner. The complaint alleged that the police department's disciplinary system was not administered effectively and did not sufficiently prevent or punish misconduct. All plaintiffs sought (in addition to damages sought by the individuals) the imposition of a new disciplinary system to be created by the district court and which would be subject to district court supervision with periodic reporting to the court.

The complaint's allegations with respect to the petitioner appear below in their entirety:

> "5. Plaintiff AFRO-AMERICAN PATROLMEN'S LEAGUE, INC. ('AAPL') is an Illinois not-for-profit corporation whose membership consists of approximately 1400 Black Chicago police officers. The purposes of AAPL are to improve the personnel practices of the Chicago Police Department with respect to

> Black policemen and police candidates, to preserve and protect the rights of residents of Chicago against abusive and arbitrary police conduct, to assure that police officers conform to lawful standards of conduct, to obtain public access to information concerning Police Department operations, and to improve police service to the community. AAPL has undertaken a variety of activities in carrying out its purposes, including:
>
> "(a) Establishment and operation of a program that has received complaints of police misconduct from hundreds of persons, including some of the individual Plaintiffs, and has sought redress for these clients;
>
> "(b) Program and activities for education of the public with respect to police administration and conduct;
>
> "(c) Initiation and pursuit of a complaint to the federal Law Enforcement Assistance Administration concerning racial discrimination in the personnel practices and policies of the Chicago Police Department, resulting in an investigation by LEAA that found significant and unjustified adverse impact of those practices and policies on Black and Latin policemen and police candidates;
>
> "(d) Formulation of proposals for specific reforms in police administration and conduct;
>
> "(e) Meetings and negotiations with the responsible public officials to seek implementation of those proposals; and
>
> "(f) Public advocacy of its purpose and proposals.
>
> "In addition, the members of AAPL have been adversely affected by the matters alleged in this Com-

plaint because the reputations of its members as police officers have been diminished in the community.

• • •

"27. The matters alleged in Paragraphs 14 through 26 [the alleged ineffectiveness of the disciplinary system] have been brought to the attention of Defendants Conlisk, the Police Board and the City of Chicago and appropriate reforms demanded on many occasions over a period of years by various persons and groups, including the Plaintiff Organizations, but these defendants have failed or refused to acknowledge these matters or to take appropriate and effective action to remedy and correct them.

"28. The three Plaintiff organizations have attempted to procure redress through the police discipline system and other official avenues for their hundreds of clients, including the individual Plaintiffs, who have been deprived of constitutional rights by policemen. However, as a result of the matters alleged in Paragraphs 22 through 27 concerning the police discipline system, the Plaintiff organizations and their clients have no effective avenue through which to procure official action to redress or prevent such deprivations, and public confidence in the police discipline system and the Police Department as a whole has been severely undermined."

The District Court, on the basis of these allegations, dismissed petitioner for want of standing. The Court of Appeals affirmed, stating that, *inter alia,* the League had no standing because the relief it sought was potentially adverse to its members.

REASONS FOR DENYING THE WRIT

I.

THE COURT BELOW ADHERED TO THE WELL SETTLED RULE THAT AN ORGANIZATION LACKS STANDING IF IT CLAIMS NO HARM OF A SUBSTANTIAL NATURE TO ITSELF OR ITS MEMBERS.

The petitioner presents no novel question. The opinion of the Seventh Circuit holding that the petitioner did not have sufficient interest in the outcome of the suit is consistent with the settled rule that a party must truly gain from the suit in order to have standing. Upon the facts contained in the complaint, it is apparent that the petitioner would not gain an advantage from this lawsuit.

To understand the nature of the harm alleged by petitioner, it is useful to contrast it to that of the individual plaintiffs, who allege real injury: the individuals claimed to be victims of excessive force, unfounded arrests or other police misconduct. Petitioner does not claim it or its members are victims of misconduct. Rather, the only legally cognizable harm alleged to have been done to the Afro-American Patrolmen's League or its members was to the "reputation of its members as police officers" which have been "diminished in the community." Complaint, *supra,* at p. 4.

Harm to the league's reputation is not a right of constitutional dimension. Harm to the members' dignity does not supply a basis for the federal court's intervention in the police disciplinary system which the complaint seeks. Moreover, the claim does not create " a logical nexus be-

tween the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1965).

The opinion of the Seventh Circuit, holding that such a claim of harm by an association does not confer standing is consistent with the position taken by this Court. The Afro-American Patrolmen's League's claim is similar to one rejected by this Court in *Wrath* v. *Selvin*, ... U.S. ....., 43 U.S.L.W. 4906, June 25, 1975. There taxpayers in the City of Rochester claimed that the discriminatory housing policies of the adjoining community of Penfield caused an increase in the Rochester plaintiffs' taxes. The court stated that:

> "even if we assume that the taxpayers-petitioners could establish that Penfield's zoning practices harm them, their complaint nonetheless was properly dismissed. Petitioners do not, even if they could, assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have incidental adverse effect on Rochester." 43 U.S. L.W. at 4911.

In this case the police excesses, for whatever harm they have allegedly caused the individual plaintiffs, do not harm a protected right of the Afro-American Patrolmen's League. It has only "some incidental adverse effect" upon members of the Afro-American Patrolmen's League and therefore they are not sufficiently harmed to present a "case or controversy."

The *Wrath* Court also noted that "the taxpayer-petitioners are not themselves subject to Penfield's zoning practices . . . No relationship, other than an incidental congruity of interest, is alleged to exist between the Rochester taxpayers and persons who have been precluded from living

in Penfield." 43 U.S.L.W. at 4912. Members of the Afro-American Patrolmen's League, similarly, are not, themselves, victims of the alleged excessive police conduct claimed by the other plaintiffs. The League has nothing but "an incidental congruity of interest."

In *Wrath* the Court carefully noted that the "case or controversy" requirement of Article III requires that a plaintiff "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." 43 U.S.L.W. at 4908. Because the League members' injury is different in quality from that of the individual plaintiffs and is not a constitutionally cognizable one, the League's assertion of harm to the reputation of its members on account of the alleged misconduct of certain policemen does not give it standing to present a claim in this lawsuit.

Neither does the League's *goal* of reducing incidents of alleged excessive force and alleged police misconduct confer standing. Advocacy of solutions to problems is not the same as being *harmed* by the problems. Standing is conferred by injury; if any person or organization could claim standing merely on account of an interest in a problem and advocacy of a certain solution, the concept of standing would be reduced to nothing. Any person with sufficient feeling about a problem may file a lawsuit, but clearly every plaintiff, merely because he is a plaintiff or feels strongly about a problem cannot claim to present a "case or controversy" appropriate for a court's consideration. As the Supreme Court noted in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), even long-standing concern with or expertise in the situation before the Court is not sufficient. 405 U.S. at 736.

II.

THE SEVENTH CIRCUIT WAS CORRECT IN HOLDING THAT SINCE THE PETITIONER AND ITS MEMBERS POTENTIALLY MAY BE HARMED BY THE RELIEF THEY SEEK, THEY DO NOT HAVE STANDING.

In its opinion, the Seventh Circuit pointed out that a potential conflict of interest existed on the part of the Afro-American Patrolmen's League. The substance of the League's complaint is the ineffectiveness of the disciplinary system. But to the extent that system becomes more effective, all policemen, including members of the Afro-American Patrolmen's League, will be subject to more vigorous discipline. Those whose dereliction of duty (including perhaps "renegade" members of the Afro-American Patrolmen's League) may escape attention under the present system will suffer more severe penalties should the petitioner prevail. Whatever the stated goals of the League, it was reasonable for the court below to conclude that the activities of all members of the Police Department including members of the Afro-American Patrolmen's League will be subject to closer scrutiny if the petitioner received the relief it sought. It has been a long-standing element of a "case or controversy" that a person have "a personal stake in the outcome of the controversy" and the dispute be presented in an "adversary context." *Sierra Club* v. *Morton,* 405 U.S. 727, 732 (1972); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); *Flast* v. *Cohen,* 392 U.S. 83, 95, 96-7, 101; *Aetna Life Ins. Co.* v. *Haworth,* 200 U.S. 227, 240-41 (1936). The importance of the adversary context is its guarantee of the quality of the presentation of the issue to the Court. In an adversary context "a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests." *Flast* v. *Cohen,* 392 U.S. at 96-7.

In the present case the members of the Afro-American Patrolmen's League have no personal stake in the outcome of the case. If they lose the case, their employment with the police department, presumably, will be subject to less scrutiny and discipline will be less vigorous; but if they win, the opposite will occur and their job will be that much more difficult.

Petitioners argue that it is not fatal that a party is unable to present a case in an adversary position. But the only cases cited to support their argument are class action cases decided by lower federal courts. In those cases, *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (2d Cir. 1968); *Rosado* v. *Wyman,* 322 F. Supp. 1173 (E.D. N.Y. 1970), aff'd. 437 F. 2d 619 (2d Cir. 1970), 402 U.S. 991 (1971); and *Giordano* v. *Radio Corp. of America,* 183 F. 2d 558 (3rd Cir. 1950), the courts permitted prosecution of the cases as class actions, despite evidence that some members of the class did not support the action. But in each of those cases, there was no evidence that the representative, itself, was not able to present its case in an adversary context. Moreover, members of a class who do not support the position of the class representative may choose not to be represented.

The decision of the Seventh Circuit is not in conflict with the cited cases. Here, it is not one or two members of the class which may be in conflict with the relief sought, but it is the representative itself and its entire membership. Petitioner cites no case in which a plaintiff was held to

have standing when it could not present its case in an adversary context on account of the potential of being injured by the relief sought.

Petitioner also claims that the Seventh Circuit had no right to state that the League and its members could be harmed by a judgment in this favor, since this was an appeal from a motion to dismiss the complaint. They state that the allegations of the complaint as to the League must be taken as time, and no other evidentiary matters may be considered. Accordingly, they claim, since the complaint did not allege the potential conflict, the Seventh Circuit had no right to infer it. But while it is uncontested that the petitioner's case is measured by the complainants' allegations, the Seventh Circuit is not required to close its eyes to the obvious. It was no impropriety for the court to consider the consequences which logically follow from the imposition of relief the petitioner requested. It stated:

> "Assuming that any remedy is ever issued as a result of this suit, the members of the AAPL would likely be directly affected. The increased vigor in disciplinary proceedings against police misconduct, which this suit seeks to initiate, could result in AAPL members who now escape disciplinary sanctions becoming subject thereto. A clear potential conflict of interest exists so long as we assume, as we do, that AAPL members, as well as other policemen could be adversely affected under a remedy entered at some future time in this suit." 520 F. 2d 1 at .....

It is inescapable that the petitioner could not present this case in the required adversary context. The Seventh Circuit's affirmance of the League's dismissal for lack of standing is supported by precedent and logic. No contrary decision of this or lower court exists.

CONCLUSION

For these reasons certiorari should be denied on the issue of petitioner's standing.

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